

BEFORE THE  
SURFACE TRANSPORTATION BOARD

ORIGINAL

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STB FINANCE DOCKET NO. 34753

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CENTRAL ILLINOIS RAILROAD COMPANY  
- OPERATION EXEMPTION -  
- RAIL LINE OF THE CITY OF PEORIA, IL



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REPLY OF CENTRAL ILLINOIS RAILROAD COMPANY  
TO  
PETITION TO REVOKE OR REJECT

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Dated: December 21, 2006

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SURFACE TRANSPORTATION BOARD

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INTRODUCTION

On November 28, 2006, Pioneer Industrial Railway Co. ("PIRY") filed a Petition to Reject or Revoke<sup>1</sup> a Notice of Exemption submitted some 15 months before in the above-captioned proceeding by Central Illinois Railway Company ("CIRY") to operate 1.9 miles of railroad owned by the City of Peoria ("the City"). For the reasons discussed below, PIRY's petition should be rejected as being without merit.

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<sup>1</sup> Normally CIRY's reply would have been due December 18, 2006. However, CIRY has requested a short extension until December 21, 2006, to submit this filing. PIRY has consented to CIRY's request.

## BACKGROUND

CIRY is a class III short line railroad headquartered in Granville, IL. As relevant here, it is controlled by Central Illinois Rail Holdings ("Holdings"), which is in turn owned by Robert Pachmayer.<sup>2</sup> CIRY is not affiliated, directly or indirectly, with any other rail carriers subject to Board jurisdiction.

CIRY was originally established on February 28, 1997, by Donald Gibson and his wife Paula Mudge-Gibson to acquire and operate short line railroads. On June 28, 2004, CIRY filed a verified notice with the Board to operate a line of railroad, the Kellar Line, an 8.29 mile line owned by the City and extending between MP 1.71 and MP 10.0 in the City of Peoria and the Village of Peoria Heights, IL. The Board published notice of that exemption in a decision served July 28, 2004.<sup>3</sup> Subsequently, the City designated CIRY to operate an 1800-foot long connecting track the City had constructed<sup>4</sup> to connect the Kellar Branch with the track that is the subject of this proceeding. On September 7,

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<sup>2</sup> Robert Pachmayer established CIRH as a holding company to own CIRY.

<sup>3</sup> In Central Illinois Railroad Company-Operation Exemption-Rail Line of the City of Peoria and the Village of Peoria Heights in Peoria and Peoria Heights, IL, STB Finance Docket No. 34518.

<sup>4</sup> The Board authorized the City to construct this track in City of Peoria, IL, d/b/a Peoria, Peoria Heights & Western Railroad - Construction of Connecting track Exemption - In Peoria County, IL, STB Finance Docket No. 34395 (served Sept. 17, 2004).

2005, CIRY filed another verified notice of exemption (hereafter referred to as the "September notice") at the behest of the City to operate the subject 1.9 miles of track known as the "Western Connection." CIRY consummated that transaction on or about September 14, 2005, and the Board published notice of that exemption on October 6, 2005. It is *this* exemption and transaction that is the subject of PIRY's challenge. Finally, the current owner acquired, CIRY from the former owners on August 18, 2006, in a stock transaction outside the Board's jurisdiction.

The gist of PIRY's rambling, repetitive challenge is that 1) the September filing is in PIRY's words *materially false and misleading* because another entity identified as DOT Rail Services ("DOTR") is the entity with whom the City contracted to provide service on the Western Connection and that it, rather than CIRY, should have been the applicant on the September filing, 2) CIRY is therefore without authority to operate the Western Connection, 3) that the City's construction filing in FD No. 34395 does not designate an operating carrier and that operation of this connection by either CIRY or CIRH is unauthorized, 4) that the common control of CIRY, CIRH, and/or DOTR is unauthorized because no application or petition for common control has been submitted to the Board for approval, 5)

that "new evidence" justifies reopening of this proceeding, and 6) that CIRY's operation exemption request is contrary to the Rail Transportation Policy of the Board's enabling statute and is also an "abuse" of the Board's processes.

#### ARGUMENT

PIRY's arguments are garbage. PIRY fails to disclose that its interest in this matter is more than just that of an informal, self appointed guardian of the Board's statute, rules, and regulations. It is a former, disappointed operator of the Kellar Branch that the City has been trying to evict from the line upon termination of its operating contract. See, City of Peoria and Village of Peoria heights, IL, Adverse Discontinuance-Pioneer Industrial Railway Company, STB Docket No. AB-878 (granted August 10, 2005).<sup>5</sup> Not content to just pursue short line opportunities elsewhere, PIRY is attempting to insert itself in the regulatory process for the sole purpose of depriving the City of using its new designated short line operator. Moreover, many of PIRY's arguments and positions taken here are merely recycled versions of leftovers it unsuccessfully advanced in the proceeding (FD No. 34518)

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<sup>5</sup> Proceeding currently being held in abeyance.

involving CIRY's assumption of operations on the Kellar Branch.<sup>6</sup>

PIRY fails to show any basis for rejection or revocation of CIRY's exemption. As a general matter, the Board and the ICC have consistently held that an exemption may be rejected or revoked "when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of sec. 10101a of this title." Thus, the standard for rejecting or revoking an exemption is whether regulation is needed to carry out the rail transportation policy. The party seeking relief has the *burden of proof* [emphasis supplied], and petitions must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted. Minnesota Comm. Ry., Inc. - Trackage Exempt. - BN RR. CO., 8 I.C.C.2d 31, 35 (1991) and cases cited therein.

Typically, the Board rejects or revokes an exemption where the notice contains *materially* false or misleading

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<sup>6</sup> There as here PIRY asked the Board to reject or revoke CIRY's operation notice asserting that it was false and misleading, among other things. Specifically, PIRY argued that the notice, though styled as an attempt to substitute one operator [CIRY] for another [PIRY], is in reality an attempt to place a second operator on the line. PIRY claimed that the notice did not clearly identify CIRY as the operator of the line. Finally, PIRY accused CIRY of "abusing" the Board's regulatory processes by submitting this exemption. By decision served February 23, 2005, the Board rejected PIRY's arguments and denied its petition to reject or revoke.

information, the applicant has utilized the wrong regulatory procedure, the applicant is misusing Board procedures for a sham transaction, the transaction is very controversial requiring a more detailed record, or there is a *demonstrated* need for regulation. Id. at 37; The Land Conservancy of Seattle & King County -- Acquisition & Operation Exemption -- The Burlington Northern & Santa Fe Ry. Co., STB Finance Docket No. 33388 (STB served Sept. 26, 1997) (Board will revoke an exemption "[t]o protect the integrity of our processes"); Riverview Trenton Railroad Company -- Acquisition and Operation Exemption -- Crown Enterprises, Inc., STB Finance Docket No. 33980 (STB served Feb. 15, 2002) (controversial proceeding not suitable for class exemption); SF&L Railway, Inc.-Acquisition And Operation Exemption-Toledo, Peoria And Western Railway Corporation, et al, STB Finance Docket No. 33995 (STB served October 17, 2002) (abuse of class exemption process); and Finance Docket No. 32407 (ICC served April 22, 1994) (material misstatements of fact and controversial proceeding).

Here the principal basis for PIRY's request is its claim that CIRY misused Board procedures by representing that it had executed a contract to operate a rail line when, in fact, it had not done so. At that time that CIRY

filed its exemption notice CIRY and DOTR were sister corporations.<sup>7</sup> As the attached letter<sup>8</sup> from Thomas McFarland, Esq., STB counsel for the City and former counsel for CIRY, states, the City awarded the operating contact to DOTR or its *designee*. It was the intention of the parties that CIRY would be the operator of the Western Connection although through inadvertence the parties had failed to "dot the I's and cross the t's." The fact is that CIRY has been providing service over the Western Connection and the 1800-foot connecting track since the start up of operations over each. CIRY would be happy to amend the exemption notices or resubmit new notices to reflect these changes if so directed by the Board. Regarding PIRY's unauthorized common control claim, neither DOTR nor CIRH has ever provided rail service and CIRH has no relation to DOTR so this argument is moot.

Petitioners do not cite, let alone, address the Board's standards for granting the rejection or revocation of an exemption. While PIRY identifies some concerns that might provide an *arguable* basis for relief, they have no basis in fact as Mr. McFarland's letter demonstrates. Nor have they shown any actions or service failures by CIRY

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<sup>7</sup> CIRY owner Robert Pachmayer acquired stock control of that company. He acquired the assets of DOTR but not its stock.

<sup>8</sup> Submitted as Exhibit A.



that would require any regulation or oversight by the Board.

Finally, PIRY's claim for reopening should similarly be rejected out of hand. While the Board has the power to reopen its proceedings at any time, a petitioner must show either changed circumstances, new evidence, or a material error. 49 CFR 1115.4. Although PIRY cites "new evidence," presumably its discovery that it was DOTR not CIRY that executed the agreement with the City, PIRY does not show why this information is material or could not have been submitted at a much earlier date. The contract was dated June 26, 2000, and the exemption notice was filed some 15 months ago. And even PIRY's vendetta against the City and CIRY is nothing new. Simply stated, Petitioners have failed in their burden of proof.

CONCLUSION

The Board should deny PIRY's Petition to Reject or Revoke for lack of any basis in fact along with a failure to satisfy its burden of proof.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. D. Heffner', with a long horizontal flourish extending to the right.

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(202) 263-4180

Dated: December 21, 2006

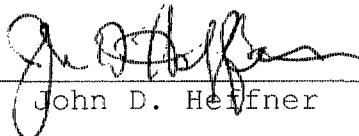
**CERTIFICATE OF SERVICE**

This is to certify that copy of the Reply of Central  
Illinois Railroad Company to Petition to Revoke or Reject  
was served on December 21, 2006 to the following:

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John D. Heffner

# EXHIBIT A

LAW OFFICE  
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THOMAS F. MCFARLAND

December 19, 2006

*By e-mail to j.heffner@verizon.net*

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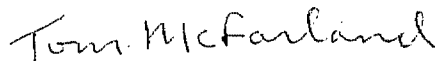
Re: Central Illinois Railroad Company

Dear John:

This confirms our conversation this morning about the above subject.

In my capacity as attorney for the City of Peoria (the City), it is my understanding that the Operating Agreement between the City and DOT Rail Service, Inc. (DOT) was made by DOT for the benefit of its wholly-owned subsidiary, Central Illinois Railroad Company (CIRY), and that it was contemplated and intended that CIRY, not DOT, would provide rail service on and over the "Western Connection," i.e., the 1.9-mile former Union Pacific Railroad Company (UP) rail line extending eastward from Pioneer Junction and the 1,800-foot track connecting that former UP rail line to the Kellar Branch.

Very truly yours,



Thomas F. McFarland  
*Attorney for the City of Peoria*

*TMCF:kl:wp8.0\1183\emJDH1*

cc: Randy Ray, Esq., City of Peoria, *by e-mail to Rray@ci.peoria,il.us*